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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA-EASTERN DIVISION

EVAN SHADLE,)	Case No. EDCV 18-00806-AS
)	
Plaintiff,)	MEMORANDUM OPINION AND
)	
v.)	ORDER OF REMAND
)	
ANDREW M. SAUL, Commissioner)	
of the Social Security)	
Administration, ¹)	
)	
Defendant.)	
_____)	

For the reasons discussed below, IT IS HEREBY ORDERED that, pursuant to Sentence Four of 42 U.S.C. § 405(g), this matter is remanded for further administrative action consistent with this Opinion.

¹ Andrew M. Saul is now the Commissioner of the Social Security Administration and is substituted in for Acting Commissioner Nancy A. Berryhill in this case. See Fed.R.Civ.P. 25(d).

1 On October 18, 2016, the Administrative Law Judge ("ALJ"), Donald
2 Colpitts, heard testimony from Plaintiff (represented by counsel) and
3 vocational expert Robin Generaux. (See AR 38-55). On January 27, 2017,
4 the ALJ issued a decision denying Plaintiff's applications. (See AR 23-
5 31). Applying the five-step sequential process, the ALJ found at step
6 one that Plaintiff had not engaged in substantial gainful activity since
7 August 1, 2012. (AR 25). At step two, the ALJ determined that
8 Plaintiff had the severe impairments of cardiac dysrhythmia and
9 shortness of breath. (AR 25). At step three, the ALJ concluded that
10 Plaintiff did not have an impairment or combination of impairments that
11 met or equaled the severity of one of the listed impairments. (AR 25-
12 26). The ALJ then determined that Plaintiff had the residual functional
13 capacity ("RFC")² to perform light work.³ (AR 26-29).

14
15 At step four, the ALJ determined that Plaintiff was able to perform
16 past relevant work as a security guard and alternatively determined,
17 based on Plaintiff's age, education, experience, and RFC, that there are
18 jobs that exist in significant numbers in the national economy that
19 Plaintiff can perform. (AR 29-30). Accordingly, the ALJ found that
20

21
22 ² A Residual Functional Capacity is what a claimant can still do
23 despite existing exertional and nonexertional limitations. See 20
24 C.F.R. §§ 404.1545(a)(1), 416.945(a)(1).

25 ³ "Light work involves lifting no more than 20 pounds at a time
26 with frequent lifting or carrying of objects weighing up to 10 pounds.
27 Even though the weight lifted may be very little, a job is in this category
28 when it requires a good deal of walking or standing, or when it involves
sitting most of the time with some pushing and pulling of arm or leg controls.
To be considered capable of performing a full or wide range of light work, you
must have the ability to do substantially all of these activities. If someone
can do light work, we determine that he or she can also do sedentary work,
unless there are additional limiting factors such as loss of fine dexterity or
inability to sit for long periods of time." 20 C.F.R. §§ 404.1567(b),
416.967(b).

1 Plaintiff was not disabled within the meaning of the Social Security
2 Act. (AR 30-31).

3
4 The Appeals Council denied Plaintiff's request for review on March
5 19, 2018. (See AR 3-6). Plaintiff now seeks judicial review of the
6 ALJ's decision, which stands as the final decision of the Commissioner.
7 See 42 U.S.C. §§ 405(g), 1383(c).

8
9
10 **STANDARD OF REVIEW**

11 This Court reviews the Commissioner's decision to determine if it
12 is free of legal error and supported by substantial evidence. See
13 Brewes v. Comm'r, 682 F.3d 1157, 1161 (9th Cir. 2012). "Substantial
14 evidence" is more than a mere scintilla, but less than a preponderance.
15 Garrison v. Colvin, 759 F.3d 995, 1009 (9th Cir. 2014). To determine
16 whether substantial evidence supports a finding, "a court must consider
17 the record as a whole, weighing both evidence that supports and evidence
18 that detracts from the [Commissioner's] conclusion." Aukland v.
19 Massanari, 257 F.3d 1033, 1035 (9th Cir. 2001)(internal quotation
20 omitted). As a result, "[i]f the evidence can support either affirming
21 or reversing the ALJ's conclusion, [a court] may not substitute [its]
22 judgment for that of the ALJ." Robbins v. Soc. Sec. Admin., 466 F.3d
23 880, 882 (9th Cir. 2006).⁴

24
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27 ⁴ The harmless error rule applies to the review of
28 administrative decisions regarding disability. See McLeod v. Astrue,
640 F.3d 881, 886-88 (9th Cir. 2011); Burch v. Barnhart, 400 F.3d 676,
679 (9th Cir. 2005)(An ALJ's decision will not be reversed for errors
that are harmless).

1
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3 **PLAINTIFF'S CONTENTIONS**

4 Plaintiff alleges that (1) the ALJ erred in failing to provide
5 clear and convincing reasons for finding Plaintiff's testimony not
6 credible, and (2) the medical evidence submitted to the Appeals Council
7 undermines the ALJ's decision. (See Joint Stip. at 4-10, 15-20).

8 **DISCUSSION**

9
10 After consideration of the record as a whole, the Court finds that
11 Plaintiff's first claim of error warrants a remand for further
12 consideration. Since the Court is remanding the matter based on
13 Plaintiff's first claim of error, the Court will not address Plaintiff's
14 second claim of error.

15
16 **A. The ALJ Did Not Properly Assess Plaintiff's Testimony**

17
18 Plaintiff asserts that the ALJ did not provide clear and convincing
19 reasons for rejecting Plaintiff's testimony about his symptoms and
20 limitations. (See Joint Stip. at 4-10, 15). Defendant asserts that the
21 ALJ provided valid reasons for finding Plaintiff not fully credible.
22 (See Joint Stip. at 10-15).

23
24 1. Legal Standard

25
26 Where, as here, the ALJ finds that a claimant suffers from a
27 medically determinable physical or mental impairment that could
28 reasonably be expected to produce his or her alleged symptoms, the ALJ

1 must evaluate "the intensity and persistence of those symptoms to
2 determine the extent to which the symptoms limit an individual's ability
3 to perform work-related activities for an adult" Soc. Sec.
4 Ruling ("SSR") 16-3p, 2017 WL 5180304, *3.⁵

5
6 A claimant initially must produce objective medical evidence
7 establishing a medical impairment reasonably likely to be the cause of
8 the subjective symptoms. Smolen v. Chater, 80 F.3d 1273, 1281 (9th Cir.
9 1996); Bunnell v. Sullivan, 947 F.2d 341, 345 (9th Cir. 1991). Once a
10 claimant produces objective medical evidence of an underlying impairment
11 that could reasonably be expected to produce the pain or other symptoms
12 alleged, and there is no evidence of malingering, the ALJ may reject the
13 claimant's testimony regarding the severity of his or her pain and
14 symptoms only by articulating specific, clear and convincing reasons for
15 doing so. Brown-Hunter v. Colvin, 798 F.3d 749, 755 (9th Cir.
16 2015)(citing Lingenfelter v. Astrue, 504 F.3d 1028, 1036 (9th Cir.
17 2007)); see also Smolen, supra; Robbins v. Social Sec. Admin, 466 F.3d
18 880, 883 (9th Cir. 2006); Reddick v. Chater, 157 F.3d 715, 722 (9th Cir.
19 1998); Light v. Social Sec. Admin., 119 F.3d 789, 792 (9th Cir. 1997).
20 Because the ALJ does not find that Plaintiff was malingering, the "clear
21 and convincing" standard stated above applies.

22
23 Generalized, conclusory findings do not suffice. See Moisa v.
24 Barnhart, 367 F.3d 882, 885 (9th Cir. 2004)(the ALJ's credibility

25
26
27 ⁵ SSR 16-3p, which superseded SSR 96-7p, is applicable to this
28 case, because SSR 16-3p, which became effective on March 28, 2016, was
in effect at the time of the Appeal Council's March 19, 2018 denial of
Plaintiff's request for review. 20 C.F.R. § 404.1529, the regulation on
evaluating a claimant's symptoms, including pain, has not changed.

1 findings "must be sufficiently specific to allow a reviewing court to
2 conclude the [ALJ] rejected [the] claimant's testimony on permissible
3 grounds and did not arbitrarily discredit the claimant's testimony")
4 (citation and internal quotation marks omitted); Holohan v. Massanari,
5 246 F.3d 1195, 1208 (9th Cir. 2001)(the ALJ must "specifically identify
6 the testimony [the ALJ] finds not to be credible and must explain what
7 evidence undermines the testimony"); Smolen, 80 F.3d at 1284 ("The ALJ
8 must state specifically which symptom testimony is not credible and what
9 facts in the record lead to that conclusion.").

10
11 2. The ALJ's Credibility Findings

12
13 Plaintiff made the following statements in an Exertion
14 Questionnaire dated September 15, 2014 (see AR 222-24):

15
16 He lives with family in a mobile home. (AR 222).

17 After about 1/2 of an hour of physical activity, he
18 experiences weakness and shortness of breath. In the evening
19 he walks approximately 1/4 of a mile (approximately 10
20 minutes), which leaves him tired and in need of rest. He
21 does not climb stairs. He can lift and carry small furniture
22 and small dogs throughout the day. He does not use any
23 assistive devices. (AR 222-24).

24 He often feels tired and fatigued. On an average day he
25 drives children to school and does light housework. He does
26 grocery shopping 3 to 4 times a week. He vacuums (30
27 minutes), mops (20 minutes), does laundry (1 hour) and does
28 dishes (10 minutes). He drives a car, for up to 20 miles at
one time. With respect to yard work, he picks up trash,
waters, and rakes (but they make him tired). After doing
housework/chores for 1/2 of an hour, he is tired and out of
breath. Before becoming disabled, he was able to work hard
for hours. (AR 222-24).

He sleeps 7 to 8 hours. During the day he requires a
nap or rest period of 1/2 to 1 hour. (AR 224).

1 He takes the following medications: Coreg, 25 mg, 2
2 times per day; Lisinopril, 10 mg, 1 time per day; Digoxin, 25
3 mg, 1 time per day; Eliquis, 5 mg, 2 times per day; and
4 Cartia, 250 mg, 2 times per day. (AR 224).

5 Plaintiff gave the following testimony at the administrative
6 hearing (see AR 40-53):

7
8 He lives with his wife, 22-year-old daughter and 18-
9 year-old son in a mobile home. He received a GED. He is 6
10 feet, 5 inches tall and weighs 275 pounds (since 2012 his
11 weight has fluctuated from 350 pounds to 260 pounds). He
12 last worked in April 2010, when he was laid off due to his
13 department being phased out. (AR 40-42).

14 He has been diagnosed with fibrillation. He has had
15 three separate procedures (cardioversions) to try to correct
16 it, but they have been unsuccessful. Doctors have told him
17 about cardio ablation as an option, which he plans to pursue
18 (it has not been scheduled). (AR 44-45).

19 He has arrhythmia. Doctors are trying to control it with
20 medication. (AR 51-52).

21 He has severe sleep apnea. He uses a CPAP machine,
22 which helps him. (AR 45, 52).

23 He had a past left ankle injury. Residual symptoms from
24 that injury are swelling and a crooked left ankle. He has
25 chronic pain -- a dull ache in the ankle and sharp pains in
26 the foot -- all the time. The pain causes him to limp and
27 affects his ability to function. Too much time on his ankle
28 is unbearable. For his ankle pain, he takes over-the-counter
pain relief medication and uses a brace (wrapped). (AR 45-
46)

In 2012, he experienced weakness and shortness of
breath. After 2012, his symptoms got progressively worse.
His shortness of breath happens more after physical activity
but sometimes happens by itself. His shortness of breath
causes him chest pain "[t]o some extent." His shortness of
breath is controlled with medication "to some degree", but is
not taken away completely. His fatigue increases with
activity but is fairly constant. He gets shortness of breath
when in public, and then has to stop what he is doing and sit
down if possible. After a night's sleep he feels physically
rested but still feels pretty tired. He needs to take two
naps a day, one in the early afternoon and one in the early

1 evening, each for approximately 1/2 hour. (AR 42-44, 50, 52-53).

2 He can do chores such as emptying the trash, mopping the
3 floor, and washing the dishes for 1/2 hour to 45 minutes
4 before he has to rest for 1/2 hour to 45 minutes. The
5 medication he takes cause him to be drowsy and fatigued. (AR
6 46-48).

7 His daily routine consists of getting up, getting the
8 children off to school, taking the dogs out (opening the
9 front door and letting them in the back yard), eating
10 breakfast, watching a little television, doing a few chores,
11 eating lunch, taking a nap, watching a little television,
12 doing a couple of chores, preparing and eating dinner, taking
13 the dogs out (walking them 2 to 3 times a week), taking
14 another nap, staying up a little with his wife (who works
15 during the day), and going to bed. His children help him
16 with driving, lifting heavy things (he believes he probably
17 can lift 25 pounds), gardening, and grocery shopping. When
18 he goes out, he has to have somebody with him because of his
19 heart condition. (AR 48-50, 52-53).

20 He does not smoke or use illegal drugs. He drinks a
21 glass of beer three times a year. He does not have any
22 hobbies. (AR 51).

23 The ALJ summarized Plaintiff's testimony as follows:

24 The claimant makes the following allegations regarding
25 the intensity, persistence, and limiting effects of his
26 symptoms. The claimant testified that he suffers from
27 weakness and shortness of breath, which have worsened since
28 2012. In addition, he suffers from fatigue, which increases
with activity, and that he takes two thirty minute naps a
day. Further, he stated that he has had various procedures
for his heart issues, and that a cardio ablation may be
performed. He stated that he uses a CPAP machine, and has
swelling and constant pain in his ankle and foot that cause
him to limp. The claimant testified that he has some pain
with shortness of breath and was recently prescribed
medication for arrhythmia. Finally, he testified that he can
lift approximately twenty five pounds. Despite these
allegations, he has admitted that he stopped working because
he was laid off in 2010, and not because of any limitations
stemming from his impairments. In addition, he can wash
dishes, take out the trash, make sure his kids get off to
school, prepare dinner, and help care for his dogs.
Moreover, he stated that he uses over-the-counter medication
for pain.

1 (AR 26-27).
2

3 After summarizing Plaintiff's testimony, the ALJ stated:
4

5 "After careful consideration of the evidence, the
6 undersigned finds that the claimant's medically determinable
7 impairments could reasonably be expected to cause the alleged
8 symptoms; however, the claimant's statements concerning the
9 intensity, persistence and limiting effects of these symptoms
10 are not entirely consistent with the medical evidence and
11 other evidence in the record for the reasons explained in
12 this decision. (AR 27). The ALJ then stated, "Turning to
13 the objective medical evidence, the evidence cannot be fully
14 reconciled with the level of pain and limiting effects of the
15 impairments that the claimant has alleged." (AR 27). The
16 ALJ proceeded to discuss the medical evidence in the record,
17 including the opinions of the State Agency medical
18 consultants, see AR 27-29, and concluded: "In sum, the above
19 residual functional capacity assessment is supported by the
20 objective medical evidence contained in the record.
21 Treatment notes in the record do not sustain the claimant's
22 allegations of disabling pain and limitations. The claimant
23 does experience some levels of pain and limitations but only
24 to the extent described in the residual functional capacity
25 above."
26

27 (AR 29).
28

1 disability onset date was August 12, 2012 - was consistent with the
2 information provided in the "Disability Report" submitted on September
3 3, 2014 in which Plaintiff alleged that he stopped working on March 1,
4 2010 because of "other reasons" not related to his conditions, namely,
5 he was laid off from work, and that his condition became severe enough
6 to keep him from working on August 1, 2012. (See AR 213-14).
7

8 Third, to the extent the ALJ discounted Plaintiff's testimony about
9 his symptoms and limitations based on Plaintiff's ability to perform
10 certain daily activities, such as washing dishes, taking out the trash,
11 making sure his kids get off to school, preparing dinner, and helping
12 care for his dogs, these reasons also fail to meet the clear and
13 convincing standard. See Vertigan v. Halter, 260 F.3d 1044, 1050 (9th
14 Cir. 2001)("[T]he mere fact that a plaintiff has carried on certain
15 daily activities . . . does not in any way detract from her credibility
16 as to her overall disability. One does not need to be 'utterly
17 incapacitated' in order to be disabled."); Reddick, 157 F.3d at 722
18 ("Only if the level of activity were inconsistent with the Claimant's
19 claimed limitations would these activities have any bearing on
20 Claimant's credibility."). While a plaintiff's ability to spend a
21 "substantial part" of his or her day engaged in pursuits involving the
22 performance of physical functions that are transferable to a work
23 setting may be sufficient to discredit him or her, here, there is no
24 evidence that Plaintiff was spending a substantial part of his day
25 engaged in these activities or that the physical demands of such tasks
26 as washing dishes, taking out the trash, making sure his kids get off
27 to school, preparing dinner, and helping care for his dogs were
28 transferable to a work setting. See Ghanim v. Colvin, 763 F.3d 1154,

1 1165 (9th Cir. 2014)("However, there is no indication here that the
2 limited activities Ghanim engaged in, often with the help of a friend,
3 either comprised a 'substantial portion' of Ghanim's day, or were
4 'transferrable' to a work environment.").

5
6 It is not clear whether the ALJ considered Plaintiff's testimony
7 about his limited abilities to perform such daily activities. In the
8 Exertion Questionnaire, Plaintiff stated that he could only walk his
9 dogs for approximately 10 minutes before he felt tired and needed to
10 rest, and that it takes him 10 minutes to wash dishes. (AR 222). At the
11 hearing, Plaintiff testified that he can do household chores such as
12 emptying the trash, mopping the floor, and washing the dishes for no
13 more than 30 to 45 minutes before needing to rest for approximately 30
14 to 45 minutes, (AR 45), he usually lets his dogs out by opening the
15 front door and letting them in the back yard, and takes his dogs out for
16 a walk 2 or 3 times a week, (AR 47-48) and that his children are old
17 enough to take care of their needs on their own. (AR 49). Therefore,
18 the degree to which Plaintiff could perform such daily activities may
19 not have been inconsistent with his testimony regarding his symptoms and
20 limitations. See Reddick, 157 F.3d at 722; see also Morgan v.
21 Commissioner of Social Sec. Admin., 169 F.3d 595, 600 (9th Cir.
22 1999)("If a claimant is able to spend a substantial part of his day
23 engaged in pursuits involving the performance of physical functions that
24 are transferable to a work setting, a specific finding as to this fact
25 may be sufficient to discredit a claimant's allegations.").

26
27 Here, the ALJ did not ask Plaintiff how much time he spent engaged
28 in his admitted daily activities or make any finding that Plaintiff's

1 ability to engage in such activities were transferable to and consistent
2 with the duties he would be performing in a work environment. Thus,
3 Plaintiff's admitted daily activities, without more, were not a legally
4 sufficient reason to reject Plaintiff's subjective symptom testimony.
5

6 Fourth, to the extent the ALJ discounted Plaintiff's testimony
7 based on the fact that Plaintiff was taking over-the-counter pain
8 medication, see SSR 16-3p, 2017 WL 5180304, *7-*8 (the effectiveness of
9 medication is one factor to be considered in evaluating the intensity,
10 persistence and limiting effects of an individual's symptoms); Warre v.
11 Comm'r of the SSA, 439 F.3d 1001, 1006 (9th Cir. 2006) ("Impairments that
12 can be controlled effectively with medication are not disabling for the
13 purpose of determining eligibility for SSI benefits."), this was also
14 not a clear and convincing reason. Plaintiff's testimony concerning his
15 use of over-the-counter medication was related solely to his ankle
16 injury (AR 48) and not to his severe impairments of cardiac dysrhythmia
17 and shortness of breath. Moreover, the medication that Plaintiff was
18 taking for his severe impairments is not over-the-counter pain
19 medication. (See AR 224, 275, 282, 297, 303, 306, 309, 332, 334, 339,
20 342, 351). In addition, Plaintiff testified that the medication he
21 takes for his shortness of breath is not totally effective. At the
22 hearing, Plaintiff testified that while his shortness of breath is
23 controlled with medication "to some degree," the medication does not
24 take away the shortness of breath completely. (AR 43).
25

26 Finally, while the ALJ also found that Plaintiff's testimony
27 concerning his symptoms and limitations was not supported by the
28 objective medical evidence, this factor cannot, by itself, support an

1 adverse finding about Plaintiff's testimony. See Trevizo v. Berryhill,
2 862 F.3d 987, 1001 (9th Cir. 2017)(once a claimant demonstrates medical
3 evidence of an underlying impairment, "an ALJ 'may not disregard [a
4 claimant's testimony] solely because it is not substantiated
5 affirmatively by objective medical evidence.'" ; quoting Robbins v. Soc.
6 Sec. Admin., 466 F.3d 880, 883 (9th Cir. 2006)); Rollins v. Massanari,
7 261 F.3d 853, 857 (9th Cir. 2001); Tidwell v. Apfel, 161 F.3d 599, 602
8 (9th Cir. 1998); Blaine v. Berryhill, 2018 WL 6243089, *4 (D. Mont. Nov.
9 29, 2018)("The ALJ's conclusion that [the claimant's] testimony would
10 only be accepted to the extent that her hearing testimony was
11 'consistent with the objective medical ... evidence' is . . . the
12 precise practice the Ninth Circuit prohibits."); see also SSR 16-3p,
13 2017 WL 5180304, *7 ("We must consider whether an individual's
14 statements about the intensity, persistence, and limiting effects of his
15 or her symptoms are consistent with the medical signs and laboratory
16 findings of record. . . . However, we will not disregard an
17 individual's statements about the intensity, persistence, and limiting
18 effects of symptoms solely because the objective medical evidence does
19 not substantiate the degree of impairment related-symptoms alleged by
20 the individual.").

21
22 Because the Court finds that the ALJ failed to provide legally
23 permissible grounds for discounting Plaintiff's symptom testimony, the
24 Court is unable to defer to the ALJ's credibility determination. Cf.
25 Flaten v. Sec'y of Health & Human Servs., 44 F.3d 1453, 1464 (9th Cir.
26 1995)(the court will defer to the ALJ's credibility determinations when
27 they are appropriately supported in the record by specific findings
28 justifying that decision)(citations omitted).

1 **B. Remand Is Warranted**

2
3 The decision whether to remand for further proceedings or order an
4 immediate award of benefits is within the district court's discretion.
5 Harman v. Apfel, 211 F.3d 1172, 1175-78 (9th Cir. 2000). Where no
6 useful purpose would be served by further administrative proceedings,
7 or where the record has been fully developed, it is appropriate to
8 exercise this discretion to direct an immediate award of benefits. Id.
9 at 1179 ("[T]he decision of whether to remand for further proceedings
10 turns upon the likely utility of such proceedings."). However, where,
11 as here, the circumstances of the case suggest that further
12 administrative review could remedy the Commissioner's errors, remand is
13 appropriate. McLeod v. Astrue, 640 F.3d 881, 888 (9th Cir. 2011);
14 Harman v. Apfel, 211 F.3d at 1179-81.

15
16 Since the ALJ failed to properly assess Plaintiff's symptom
17 testimony, remand is appropriate. Because outstanding issues must be
18 resolved before a determination of disability can be made, and "when the
19 record as a whole creates serious doubt as to whether the [Plaintiff]
20 is, in fact, disabled within the meaning of the Social Security Act,"
21 further administrative proceedings would serve a useful purpose and
22 remedy defects. Burrell v. Colvin, 775 F.3d 1133, 1141 (9th Cir.
23 2014)(citations omitted).⁷

24
25 ⁷ The Court has not reached any other issue raised by Plaintiff
26 except to determine that reversal with a directive for the immediate
27 payment of benefits would not be appropriate at this time.
28 "[E]valuation of the record as a whole creates serious doubt that
Plaintiff is in fact disabled." See Garrison v. Colvin, 759 F.3d 995,
1021 (2014). Accordingly, the Court declines to rule on Plaintiff's
claim regarding the the medical evidence submitted to the Appeals
Council (see Joint Stip. at 16-21). Because this matter is being

(continued...)

ORDER

For the foregoing reasons, the decision of the Commissioner is reversed, and the matter is remanded for further proceedings pursuant to Sentence 4 of 42 U.S.C. § 405(g).

LET JUDGMENT BE ENTERED ACCORDINGLY.

DATED: December 18, 2019

/s/
ALKA SAGAR
UNITED STATES MAGISTRATE JUDGE

⁷ (...continued)
remanded for further consideration, this issue should also be considered on remand.